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In the Supreme Court of the United States

October Term, 1980

No.

STRUTHERS WELLS CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Date: April 6, 1981

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QUESTION PRESENTED

Whether the decision and order of an administrative agency should be enforced when the final determination of that agency adopts a theory of the case diametrically opposed to the theory under which the case was litigated, where the Respondent is misled and prejudiced by the course of this litigation.

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OPINION BELOW

The opinion of the Court of Appeals, not yet officially reported, is included in the Appendix. The decision and order of the National Labor Relations Board, reported at 245 NLRB No. 150 (1980), is also included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on December 3, 1980. A timely petition for rehearing was denied on January 5, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the decision and order of an administrative agency should be enforced when the final determination of

that agency adopts a theory of the case diametrically opposed to the theory under which the case was litigated, where the Respondent is misled and prejudiced by the course of this litigation.

STATUTES AND REGULATIONS

Section 554(b)(3) of the Administrative Procedure Act, 5 U.S.C. §554(b)(3):

> Persons entitled to notice of an agency hearing shall be timely informed of the matters of fact and law asserted.

Section 102.15 of National Labor Relations Board Rules and Regulations:

> The complaint shall contain (a) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

STATEMENT OF THE CASE

This dispute arose as a result of an unfair labor practice charge filed by the Office and Professional Employees' International Union, Local No. 186, AFL-CIO, which represented certain of the office and clerical employees of the Petitioner. The National Labor Relations Board (hereafter the "Board") issued a Complaint, alleging that the Petitioner violated Sections 8(a)(1) and (5) of the National Labor Relations Act by refusing to grant merit raises to unspecified employees as provided in the collective bargaining agreement. It is the course of this litigation that is the subject of the instant petition.

Until the final determination of the Board, the General Counsel contended that the Petitioner had committed an unfair labor practice because it *had* conducted merit raise

reviews but failed to grant raises to certain worthy employees. This was the theory under which the pleadings, the hearing, the post-hearing briefs, the decision of the Administration Law Judge and the appeal to the Board were premised. At the final step of its administrative procedure, the Board unilaterally and without notice reversed its position and found an unfair labor practice violation because the Respondent *had not* conducted the merit raise reviews in the first place. Nothing in the record of this case could have placed the Petitioner on warning of the Board's last-minute adoption of a new and contradictory theory of the case.

Until the Board's final decision upset the mutually agreed-upon facts and theory of the case, whether the merit raise reviews had been conducted was not at issue. Instead the litigants offered competing accounts of what occurred *after* the reviews were conducted. A concise review of the administrative proceedings illustrates this theory.

In paragraph nine of the Complaint the General Counsel alleged that the Petitioner failed to bargain in good faith by "...repudiating its obligation to and refusing to grant merit review *raises*..." (Emphasis added). Nowhere in the Complaint is there an allegation that the merit *reviews* had not been conducted.

In response to the Petitioner's Motion To Dismiss Complaint, the General Counsel made the following representation:

> ...Article X, Section 3 required Respondent to determine "which employees are entitled to merit increases" and Sections 3 and 4 require Respondent to grant a minimum increase to such employees. The requirement is clearly stated and no provision of the contract provides any exception to this requirement. *In order to prove that Respondent repudiated such obligation, General Counsel is prepared to adduce evidence demonstrating that Respondent had determined, at the relevant times herein,*

> *that employees were "entitled" to such increases, but failed to grant increases to such employees.* (Emphasis added.)

As the last quoted sentence unmistakably indicates, the General Counsel informed the Administrative Law Judge and the Petitioner that its position was that the Petitioner *had* made merit review determinations.

In his Interim Ruling On Respondent's Motion To Dismiss the Complaint, the Administrative Law Judge denied the Petitioner's motion. The ruling explicitly reflects the theory of the General Counsel that the merit reviews had been made:

> Resolution of the deferral question may also depend in part on whether the General Counsel is able to support at the hearing the assertion in his opposing papers that Respondent, at times relevant to this case, had determined that employees were "entitled" to merit increases, but had nevertheless repudiated its contractual obligation to grant increases to such employees.

The General Counsel never abandoned the theory that the merit raise reviews *had* been conducted. For example, the General Counsel's opening statement at the Board's hearing in this matter included the following representation:

> The General Counsel will introduce evidence to show that various supervisors evaluated at least three of the unit employees and informed them that they would be receiving merit review increases during November or December, 1977.

Later in the hearing, the General Counsel took the opportunity to further explicate the theory of the case. Once again General Counsel's theory was stated as the Petitioner's "making excuses" for not granting merit raises which the Employer had previously decided upon:

> Your Honor, I don't want to mislead either you or Respondent with respect to the General Counsel theory in this case.

> The Complaint is broadly drafted in terms of employees. At the present time we have induced (sic) evidence involving three employees which we think not only affects those employees as individuals in the unit which we can specifically identify, but may go to the question of the basic theory of the case that Respondent did, in fact, make excuses for reasons which have been indicated that it was not going to go ahead with the merit increases.

The General Counsel's brief reiterated the established theory of the case. The principal argument was summarized as:

> *Respondent evaluated employees for merit raises in November and December, 1977,* determined that several employees were eligible, decided to grant such raises, and then informed at least three employees that they had been granted merit raises. (Emphasis added.)

After reciting the evidence supporting the thesis that the merit reviews *had* been conducted, the General Counsel concluded:

> Instead, the conclusion is inescapable that, *after President Wallace decided to grant merit raises in November 1977,* personnel action forms were forwarded to Respondent's supervisors. Even were the Administrative Law Judge to conclude that no personnel action forms were sent to the supervisors, it would be unreasonable not to conclude that the supervisors received at least oral notification from their superiors that *President Wallace had decided to grant at least three of the merit raises that they had recommended.* Such a conclusion is mandated by the key role played by the supervisors in the merit review process as well as by the unrebutted testimony of employees Wilkens, Irvine and Munksgard. (Emphasis added.)

The Administrative Law Judge adopted the General Counsel's theory of the case:

> The Respondent's conduct found herein, *in committing itself to pay these increases,* only to unilaterally revoke them.... (Emphasis added.)

Throughout the course of the proceedings, the General Counsel, the Respondent and two Administrative Law Judges had premised this litigation on the uncontested assumption that the Petitioner *had* conducted the merit reviews mandated by the collective bargaining agreement. Until the case reached the Board on appeal to the decision of the Administrative Law Judge, there had been no suggestion to the contrary. Nevertheless, the Board found that the Employer had committed an unfair labor practice by *not* conducting merit review evaluations:

> Consequently, Respondent's failure to review the employees' records in the last quarter of 1977 to determine which employees were entitled to merit increases, and its failure to grant such increases where warranted, constituted a clear unilateral change in the contractually established terms and conditions of employment.

The Board found that the General Counsel's position lacked factual substantiation on the record. The Board nonetheless affirmed the unfair labor practice finding by basing its decision on the exact opposite of the General Counsel's theory of the case.

The Petitioner immediately protested this surprising development by filing a Motion For Reconsideration. Two members of the Board summarily denied this motion; however, Member Truesdale dissented. Member Truesdale recognized that the Board's sudden, unilateral switch was improper:

> I was not a member of the Panel that issued the Decision and Order in this case. Unlike my colleagues, I find merit in the Motion and would grant it.

The Board petitioned the Third Circuit Court of Appeals to enforce its decision and order on the basis of 29 U.S.C. §160(e). The Court granted the Board's petition and denied the Petitioner's motion for rehearing.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of other Courts of Appeals that have held that a party has been denied procedural due process under similar circumstances.

An administrative agency must provide the procedural safeguards specified in the Administrative Procedure Act. *NLRB v. Local Union No. 25, International Brotherhood of Electrical Workers,* 586 F.2d 959 (2nd Cir. 1978). Section 554 (b)(3) of this Act requires that: "Persons entitled to notice of an agency hearing shall be timely informed of the matters of fact and law asserted." Furthermore, the Board's own regulations mirror the notice requirement mandated by the Administrative Procedure Act:

> The Complaint shall contain (a) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

29 C.F.R. §102.15.

This basic notice requirement has not been complied with in the instant proceeding.

Courts of Appeals must refuse to enforce Board orders that deny a litigant procedural due process. In *NLRB v. H. E. Fletcher Co.,* 298 F.2d 594, 600 (1st Cir. 1962), the First Circuit ruled that:

> Where the Board improperly makes its finding on a charge not contained in the complaint, and the record discloses that the basis of this finding has not been litigated at the hearing, such finding is not entitled to enforcement, *See, National Labor Rel. Bd. v. Bradley Washfountain Co.,* 192 F.2d 144 (7 Cir. 1951).

Citing the Administrative Procedure Act and Board Regulation 102.15, the Second Circuit denied enforcement to a unfair labor practice finding first raised in a post-hearing brief:

> . . . the time for giving notice of the matters of fact and law asserted is prior to the hearing, not in what the Board calls "General Counsel's post-complaint theory of the case" unveiled in a post-hearing brief.

NLRB v. Majestic Weaving Co., 355 F.2d 854, 861 (2nd Cir. 1966).

In another case involving merit raises, *Engineers & Fabricators, Inc. v. NLRB,* 376 F.2d 482, 485 (5th Cir. 1967), the Fifth Circuit refused to enforce a finding not fairly litigated:

> It offends elemental concepts of procedural due process to grant enforcement to a finding neither charged in the complaint nor litigated at the hearing.

The present case is most similar to the situation in *NLRB v. Temple-Eastex, Inc.*, 579 F.2d 932 (5th Cir. 1978). There the General Counsel switched to a second theory of the case after the hearing had been concluded The court agreed that there was some record evidence that could possibly be construed to support the new theory. However, Judge Wisdom found that this evidence had been adduced in another context and in support of the first theory of the case. Under these circumstances the Board's order could not be enforced:

> We agree with Temple-Eastex that the Board should not have issued an order based solely upon the General Counsel's new theory. Due process requires that the Board base its findings against a party only upon matters brought to the party's attention in the complaint or during the administrative hearing, and that are fully litigated. (Citations omitted.)
>
> Apart from requirements of due process, the General Counsel's failure to litigate an issue crucial to the Board's

> decision makes it impossible to determine whether the Board's findings are supported by substantial evidence, as the law requires. See *e.g., Universal Camera Corp. v. NLRB,* 1950, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456. Without any warning from the October 10 letter itself or from the General Counsel's complaint or conduct in the proceedings before the ALJ, the Company had no reason to, and did not, present any evidence going to the relevancy of the requested information to the outstanding grievance.

579 F.2d at 936-37.

Other circuits have also refused to enforce Board orders based upon a post-hearing shift of legal theories. In *NLRB v. United Aircraft Corp., Hamilton Standard Division,* 490 F.2d 1105 (2nd Cir. 1973), the Second Circuit ruled that a general allegation in the Board's Complaint did not adequately notify the employer of the conduct at issue. Citing the Administrative Procedure Act and the Board's Regulation 102.25, the Court held:

> The Board contends that this allegation is sufficient, relying on the principle that, as long as the underlying facts are alleged in the complaint, the Board may find that conduct violates a different section of the Act from that specified in the complaint. *This principle is, however, subject to the important qualification that the shift in legal theory must not prejudice the party charged with the violation.*

(Emphasis added.) 490 F.2d at 1111.

In the recent case of *U.S. Postal Service v. NLRB,* 614 F.2d 384, 386 (4th Cir. 1980), the Fourth Circuit set aside a Board Order for similar reasons:

> We agree with the Postal Service that it should not be required to introduce evidence in anticipation of such later shifts by the Board. The substantial evidence test is

> not a rigorous one but we do not believe it is met where, as here, the factual and legal theory relied upon by the agency to support its determination is completely different from the factual and legal theory upon which the evidentiary hearing was conducted.

The decision of the Third Circuit conflicts with these decisions of other Courts of Appeal and should be reversed.

2. The Third Circuit has sanctioned an administrative agency's departure from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its power of supervision.

This petition does not involve a technical defect of pleading or a peripheral procedural omission incidental to the fair contest of the relevant issues. Instead, this petition involves an administrative decision grounded upon a theory of the case that is completely opposite to the theory upon which the case was pleaded, litigated, argued, and briefed. Short of the complete denial to participate in the proceedings, it is difficult to conceive of a procedural irregularity that would work, and did in fact work, a greater deprivation of Petitioner's due process, statutory, and administrative rights.

The Third Circuit rubber-stamped the Board's deprivation of the Petitioner's fundamental due process rights. Unless this Court exercises its power of supervision over the lower courts, this grossly unfair result will go unremedied. Furthermore, the fundamental requirements of procedural due process, as understood and implemented by administrative agencies, will be substantially diluted.

The Board contends that the Petitioner cannot claim to have been surprised by its last-minute change of theory: "... since the question of whether the Company had completed the merit reviews was necessarily subsumed by the more general question of whether any employees were entitled to the increases." The Board suggests that—as a matter of simple

logic—the Petitioner should have foreseen that, at the final stage of its proceedings, the Board would reverse itself and take the position that the merit raise reviews were *not* completed. As Judge Coffin colorfully explained in *NLRB v. Dennison Manufacturing Co.*, 419 F.2d 1080 (1st Cir. 1969), *cert. den.*, 397 U.S. 1023 (1970), there is neither logic nor fairness in the Board's argument:

> The Board's syllogism is that because some acts were alleged which violate section 8(a) (2), and because that section also proscribes domination, domination was alleged. However, a specification of parts which are included in the whole is not a specification of the whole; when one orders apples at a market, he does not expect to be confronted with pears, although both are fruit. We have found no cases allowing the expansive interpretation of a complaint which the board now urges on us.

(Footnote omitted.) 419 F.2d at 1082-83.

Several Circuits have rejected the notion that, before the National Labor Relations Board, a party's attorney must contemplate and present evidence on every possible or potential theory of the case, both specified and speculative. For example, in *Northeastern Indiana Building and Construction Trades Council v. NLRB,* 352 F.2d 696, 699 (D.C. Cir. 1965), the D.C. Circuit stated:

> The Board now says that no harm was done because petitioners presumably would not have defended themselves any differently. But this is a speculation we do not indulge. Lawyers customarily try cases by reference to the issues framed in the pleadings in advance of hearing, and not in anticipation of new issues which possibly may be announced by the court in its opinion.

In *NLRB v. Tamper, Inc.*, 522 F.2d 781, 789 (4th Cir. 1975), the Fourth Circuit found that the Board's habit of fashioning new unfair labor practices after the record was closed to be "an

intolerable miscarriage of justice." In *Boyle's Famous Corned Beef Co. v. NLRB*, 400 F.2d 154, 164 (8th Cir. 1968), the Eighth Circuit observed:

> The cross-examination of General Counsel's witnesses and the raising of contravening arguments regarding the non-alleged matters in its brief after the hearing is likewise not "full litigation" of the issues by the Company. The Company could have presented contrary evidence at the hearing had it known the non-alleged matters would be relied on by the Board and the case might have been tried quite differently; it is not speculation to deem the Company was prejudiced in this situation due to lack of notice.

(Footnote omitted.)

The Third Circuit recently recognized that notice of the issues in dispute is a prerequisite of administrative procedural due process. *Amax Coal Co. v. NLRB*, 614 F.2d 872, 885 (3d Cir. 1980). However, that Court failed to apply its holding in that case to the instant litigation, which involves much more blatant and prejudicial procedural irregularities.

This case involves a proceeding wherein the administrative agency adopted a new theory of the case, which was the antithesis of its earlier theory, after the hearing, post-hearing argument, briefs, administrative law judge decision and administrative appeal. The Third Circuit has sanctioned this departure from basic procedural due process. If these administrative agency abuses are not corrected, the number of appeals to the Circuits and to this Court will only increase as frustrated litigants seek to overturn unfair administrative proceedings. Administrative agencies must, at the very least, afford all parties the minimum procedural safeguards. The Petitioner in this case was denied procedural due process before the National Labor Relations Board, as its dissenting Member agreed. This Court should exercise its supervisory power to insure that administrative agency hearings satisfy the requirements of procedural due process.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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Dated: April 6, 1981

Appendices

APPENDIX 1

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 80-1620

NATIONAL LABOR RELATIONS BOARD,
Petitioner

vs.

STRUTHERS WELLS CORP.,
Respondent

APPLICATION FOR ENFORCEMENT
NATIONAL LABOR RELATIONS BOARD
(BOARD NO. 6-CA-11088)

Argued
December 2, 1980
Before: ALDISERT, HUNTER,
and HIGGINBOTHAM, *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions of the petitioner and the respondent, it is

ADJUDGED AND ORDERED that the application of the National Labor Relations Board for enforcement of its order be and the same is hereby granted.

Costs taxed against respondent.

BY THE COURT,

ALDISERT, J.
Circuit Judge

Attest:

SALLY MRVOS
Sally Mrvos, *Clerk*
Dated: DEC 3 1980

APPENDIX 2

245 NLRB No. 150 D-5715
Warren, PA

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Sept. 28, 1979

STRUTHERS WELLS CORP.

and Case 6-CA-11088

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 186, AFL-CIO

DECISION AND ORDER

On March 22, 1979, Administrative Law Judge Robert M. Schwarzbart issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge as modified below.

[1]Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge found that Respondent violated Section 8(a)(5) and (1) of the Act by refusing in December 1977 to give certain employees merit increases assertedly owing to them under the provisions of its bargaining agreement with the Union. The record does not, however, support the finding that the specific increases allegedly withheld unlawfully were in fact due and owing at times material. Nevertheless, we agree with the Administrative Law Judge that Respondent violated the Act as alleged in the complaint, but we do so on the ground that Respondent during the period here involved improperly failed to evaluate employee performance as required by its contract, and to grant to those employees where warranted the merit increases they would have been entitled to as a consequence of such contractually required work evaluations.

Respondent's contract with the Union provides in article X, section 3:

> Management will review the Employees'[sic] records twice each calendar year, in approximately May and November, to determine which Employees are entitled to merit increases.... Merit increases granted will become effective in the first payroll period beginning after June 1 and in the first payroll period beginning after December 1, respectively.

Under Respondent's established practice, the merit review is initiated by an employee's supervisor who gives an oral evaluation of the employee's work to Respondent's industrial relations manager, R. A. Marti. He, in turn, compiles all relevant data on the matter and then discusses the proposed increase with Respondent's executive vice president, Fanaritis, and its president, Wallace. The decision to grant an employee a merit increase and in what amount is made at this top management level and, after various paperwork is completed, such decision is conveyed to the employee by his/her supervisor.

In November and/or December 1977 employees Munksgard, Irvine, and Wilkins were told that they were being recommended for merit increases and subsequently supervisors notified them that they would receive such increases. However, neither these three nor any other employees received merit increases on or about December 1, 1977. But there is no evidence that, although supervisors had put employees in for merit raises, Respondent had processed such raises and had reached a decision at the top level, as was the customary practice, either to grant or deny any merit increases at times here relevant. Rather, Industrial Relations Manager Marti stated to Union President Dickerson on December 22 that, although he had completed a review of unit employees and although some had improved greatly and were doing good work, no merit increases would be given because of Respondent's economic condition. There is nothing to show that merit increase proposals for specific employees were presented to, or decided by, Executive Vice President Fanaritis and President Wallace.

Nevertheless, the Administrative Law Judge, as stated, found (sl. op., p. 12) that employees Munksgard, Irvine, and Wilkins had unlawfully been denied merit increases, concluding that "if [as here] merit increases are announced... Respondent thereupon becomes responsible for paying them...." He supports this conclusion on the grounds that the supervisors who announced the increases had apparent authority to grant increases and that the Union and the employees were warranted in assuming the decisional process had been completed when the supervisors announced them.

As for the first point, the Administrative Law Judge is factually wrong; there is no basis for finding the supervisors had apparent authority to grant increases. Their role, as the facts outlined indicate, was to recommend, and to notify an employee of, a merit increase. There is nothing to suggest

anyone believed supervisors had the authority to grant increases. Furthermore, we have considerable doubts that even if the supervisors had the alleged apparent authority Respondent would have in the circumstances been bound to pay announced, but actually undecided, merit increases. As for the second point, that the Union and employees may have justifiably believed that the merit increase decisional process had been completed obviously does not imply or show that it had been, much less that Respondent was obligated to grant the purported increases. In short, we find, as Respondent strongly contends, that in the fall of 1977 merit increases were not processed, at least beyond Marti, that no decision was reached to give Munksgard, Irvine, and Wilkins merit increases, and thus that Respondent did not violate the Act by failing to give these employees the announced increases.[2]

Nevertheless, the applicable contract language provides, as quoted more fully above, that Respondent "will review the Employees' records" in approximately November of each year "to determine which Employees are entitled to merit increases" which "will become effective in the first payroll period beginning after December 1...." Concededly, Respondent made no such review—or at least completed no such review through top management—in the last quarter of 1977 and no employee received any merit increase in December. The reason, according to Marti, for the failure to make or complete the late 1977 reviews was, as noted above, Respondent's economic situation, not a determination that there were no employees entitled to merit increases. Thus, Marti testified to the effect that he told the Union it had been determined to give no merit increases because there had been a downturn in business, recent general

[2] *Oak Cliff-Golman Baking Company*, 207 NLRB 1063 (1973), cited by the Administrative Law Judge does not require a different result for it dealt with a situation where the employer ceased in midterm paying contractually specified wages while here there were no duly determined pay increases for Respondent to pay.

wage increases had been substantial, and Respondent had been fairly generous in the past in giving merit increases.[3] However, the applicable contractual language with respect to merit increases includes no exceptions, economic or otherwise, for omitting the twice-yearly merit increase reviews and for the granting of such increases where warranted. Consequently, Respondent's failure to review the employees' records in the last quarter of 1977 to determine which employees were entitled to merit increases, and its failure to grant such increases where warranted, constituted a clear unilateral change in the contractually established terms and conditions of employment. Respondent, by engaging in such conduct, refused to bargain collectively with the Union and thereby, we find, violated Section 8(a)(5) and (1) of the Act.[4]

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and that it take certain affirmative action in order to effectuate the purposes of the Act. We shall, therefore, order Respondent, *inter alia,* to conduct the merit increase review of employees omitted in the last quarter of 1977, determine under the standards customarily used if any employees were entitled

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[3]In its brief Respondent states that it decided in December 1977 that no employees were entitled to merit increases. However, Marti's testimony, on which Respondent relies, was that no determination was made as to whether or not any employees were entitled to merit increases and that the only decision made was not to grant any.

[4]We agree with the Administrative Law Judge that this case is not one that should be deferred to arbitration under *Collyer Insulated Wire, A Gulf and Western Systems Co.,* 192 NLRB 837 (1971), or—we add—under *Roy Robinson, Inc. d/b/a Roy Robinson Chevrolet,* 228 NLRB 828 (1977), for the issue before us does not involve contract interpretation. The merit pay provision is on its face clear and unambiguous and no construction of the contract is relevant for evaluating the reasons advanced by Respondent for failing to comply with that contract provision. Chairman Fanning and Member Jenkins in any event would not consider deferral to arbitration for the reasons set forth in their dissents in the above cases.

at that time to merit increases, and, if so, retroactively grant those employees such increases effective the first payroll period beginning after December 1, 1977, and make them whole with interest for the amount of the merit increases unlawfully withheld since that time. Said interest shall be computed in the manner set forth in *Florida Steel Corporation,* 231 NLRB 651 (1977).[5] We shall also order that Respondent cease and desist from engaging in any like or related unlawful conduct.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Struthers Wells Corp., Warren, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Office and Professional Employees International Union, Local No. 186, AFL-CIO, as the exclusive representative of its employees in the appropriate unit by failing to conduct contractually required semiannual employee merit increase reviews and by failing to grant employees merit increases where warranted. The appropriate unit is:

> All employees employed by the Respondent at its Warren, Pennsylvania, facility, in the job classifications set forth in Exhibit "A" of the collective-bargaining agreement between the Respondent and the Union, effective from November 1, 1977, to November 1, 1980, excluding guards, professional employees and supervisors, as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

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[5]See, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Conduct the merit increase reviews of employees omitted in the last quarter of 1977, determine under the standards customarily applied if any employees were entitled at that time to merit increases, and if any employees were then entitled to such increases grant those employees such increases effective as of the first payroll period beginning after December 1, 1977, and make them whole with interest for the amount of the merit increases unlawfully withheld since that time in the manner set forth in The Remedy section of this Decision.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Warren, Pennsylvania, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[6]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. September 28, 1979

JOHN H. FANNING

John H. Fanning, *Chairman*

HOWARD JENKINS, JR.

Howard Jenkins, Jr., *Member*

BETTY SOUTHARD MURPHY

Betty Southard Murphy, *Member*

(SEAL) NATIONAL LABOR
RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which we were represented by our attorney and in which all sides presented evidence, it has been found that we violated the National Labor Relations Act, as amended, in certain respects. To correct and remedy these violations, we have been directed to take certain actions and to post this notice.

WE WILL NOT refuse to bargain collectively with Office and Professional Employees International Union, Local No. 186, AFL—CIO, as the exclusive representative of our employees in the appropriate unit by failing to conduct contractually required semiannual employee merit increase reviews and by failing to grant you merit increases where warranted. The appropriate unit is:

> All employees employed by Struthers Wells Corp. at our Warren, Pennsylvania, facility, in the job classifications set forth in Exhibit "A" of the collective-bargaining agreement between the above-named Company and the Union effective from November 1, 1977, to November 1, 1980, excluding guards, professional employees and supervisors, as defined in the Act, and all other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL conduct your merit increase reviews omitted in the last quarter of 1977, determine under the stan-

dards customarily applied if any of you were then entitled to merit increases, and, if any of you were so entitled, WE WILL grant you such increases effective as of the first payroll period beginning after December 1, 1977, and WE WILL make you whole, with interest, for the amount of the merit increases unlawfully withheld since that time.

STRUTHERS WELLS CORP.
(Employer)

Dated..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building, 10th Floor, 601 Grant Street, Pittsburgh, Pennsylvania 15219, Telephone 412—644-2969.

No. 80-1711

FILED
MAY 15 1981
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

STRUTHERS WELLS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that petitioner violated the National Labor Relations Act by unilaterally changing the contractually established terms and conditions of employment through its failure to conduct the merit pay increase reviews required under the collective bargaining agreement and to grant such increases where warranted.

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Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a) is noted at 636 F. 2d 1210 (table). The decision and order of the National Labor Relations Board (Pet. App. 2a-11a) are reported at 245 N.L.R.B. No. 150.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1980. A petition for rehearing was denied on January 5, 1981. The petition for a writ of certiorari was filed on Monday, April 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant sections of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (a)(5), and (d), provide in pertinent part:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> >
> > * * * * *
> >
> > (5) to refuse to bargain collectively with the representatives of his employees * * *.
>
> Section 8(d) * * * [W]here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification * * * [gives timely notice] and continues in full force and effect * * * all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

STATEMENT

Petitioner and Local 186 of the Office and Professional Employees International Union entered into a collective bargaining agreement that was effective from November 1, 1977, to November 1, 1980. The agreement required petitioner to conduct merit reviews twice each year, in approximately May and November, to determine which of its employees were entitled to merit pay increases. (Pet. App. 3a.)

The Board, relying on an admission by petitioner's representative, found that in November 1977 petitioner failed to complete such merit reviews because of its economic situation and did not reach a final determination concerning merit increases at that time (Pet. App. 5a-6a). The Board concluded that petitioner's failure to comply with the requirements of the contract constituted a unilateral change in the contractually established terms and conditions of employment and thereby violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. 6a). The Board ordered petitioner to conduct the merit increase reviews it omitted in 1977, to determine under the standard customarily applied whether any employees were entitled to merit increases at that time, and to grant any such employees retroactive increases, with interest, effective the first payroll period beginning after December 1, 1977 (*id.* at 6a-8a).

By judgment order, the court of appeals upheld the Board's findings and enforced its order (Pet. App. 1a).

ARGUMENT

1. Petitioner does not contest that its failure to conduct the merit increase reviews required by the collective bargaining agreement, and to grant such increases where warranted, constituted a unilateral modification of the contractually established terms and conditions of employment and thus violated its bargaining obligation under the Act. See Section 8(d) of the Act, 29 U.S.C. 158(d); *NLRB* v. *Huttig Sash & Door Co.*, 377 F. 2d 964, 967-968 (8th Cir. 1967); *NLRB* v. *Scam Instrument Corp.*, 394 F. 2d 884, 887 (7th Cir.), cert. denied, 393 U.S. 980 (1968). Rather, it contends that the Board erred in finding a violation on a theory different from that litigated at the hearing before the administrative law judge (Pet. 2-6).[1] This contention turns on the

[1]The General Counsel argued that petitioner had determined under the contract to pay merit increases to three of the employees because

particular facts of this case and thus does warrant further reveiw.

At all events, petitioner's contention is without merit. Both the complaint and the bill of particulars gave sufficient notice of the issues to be determined by the Board, including the issue whether petitioner had fulfilled its contractual obligation to conduct merit reviews. Thus, the complaint, after setting out the requirements of the contract, alleged that petitioner was obligated to "review [employees' records] twice each calender year * * * to determine which [employees were] entitled to merit inceases" and that petitioner violated the Act by "unilaterally * * * repudiating its obligation to and refusing to grant merit review raises provided for in its collective-bargaining agreement with the Union" (Para. 9). The bill of particulars, which was provided at petitioner's request, further specified that petitioner "was obligated to review the records of all its employees to determine eligibility for merit review raises and grant merit review raises to those employees found eligible" and that petitioner "repudiated its contractual obligation to review the records of all its employees and

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they were told by Company supervisors that they would be receiving such increases. The administrative law judge accepted the General Counsel's theory of the case and concluded that petitioner had acted in derogation of the contract and of the Act by failing to give the merit increases provided for in the contract to these three employees. While the Board affirmed the administrative law judge's finding that petitioner had violated the Act, it rejected his rationale. The Board held that, regardless of the supervisors' representations, petitioner did not become obligated to pay merit increases to particular employees until higher management officials reached a final determination on the issue. However, relying on the testimony of Company Representative Raymond Marti that no final determination regarding merit increases for individual employees had been made in November 1977 (see page 5, *infra*), the Board concluded that petitioner had violated the Act by unilaterally abrogating the contractual obligation to conduct merit reviews at that time (Pet. App. 5a-6a).

grant merit review raises to those employees found eligible" (Paras. 1 & 2). In addition, during the hearing on the complaint, the administrative law judge specifically explained to petitioner's counsel that the issue to be decided in the case was not "whether [particular] individuals are entitled to an increase, but whether a determination had been made with regard to these individuals" (Tr. 77). Accordingly, petitioner was clearly on notice that the question of its compliance with the merit review provision of the contract was at issue in the case, and it was afforded a full opportunity to litigate that question and justify its actions.

Moreover, when Raymond Marti, the manager of industrial relations who was responsible for the merit reviews, testified that he had reviewed the employees but did not determine that any were entitled to merit increases (Tr. 24) the administrative law judge inquired (Tr. 24-25) whether this testimony meant that no employees were entitled to merit increases or that management had made no determination on the issue. Marti responded (Tr. 25) that "[w]e made no determination, I made no determination * * * the decision arrived at was to not grant merit increases." Petitioner could not help but be aware that such failure to reach a final determination on individual merit increases violated the collective bargaining agreement and thus could be the basis of an unfair labor practice finding.[2]

2. The cases on which petitioner relies (Pet. 7-10) are plainly distinguishable. Thus, in both *NLRB* v. *United Aircraft Corp.*, 490 F. 2d 1105, 1112 (2d Cir. 1973), and *NLRB* v. *Majestic Weaving Co.*, 355 F. 2d 854, 862 (2d Cir. 1966), the parties seeking review were able to show that they were precluded from presenting a proper defense and were therefore prejudiced by the Board's order. In *NLRB* v.

---

[2]Even now, petitioner does not dispute Marti's testimony or suggest any other evidence it would have submitted on this issue.

Temple-Eastex, Inc., 579 F. 2d 932, 936-937 (5th Cir. 1978), the court found that an issue of material fact had been neither raised nor litigated in the proceeding; on that basis, the court denied enforcement of the Board's order because it was unable to determine whether the findings of the Board were supported by substantial evidence. Similarly, in *NLRB* v. *Majestic Weaving Co.*, 355 F. 2d 854, 861 (2d Cir. 1966), *NLRB* v. *H.E. Fletcher Co.*, 298 F. 2d 594, 600 (1st Cir. 1962), *Engineers & Fabricators, Inc.* v. *NLRB*, 376 F. 2d 482, 485 (5th Cir. 1967), and *United States Postal Service* v. *NLRB*, 614 F. 2d 384 (4th Cir. 1980), the courts found that material issues had never been raised or litigated. Here, by contrast, petitioner had full notice of the relevance of the issue of merit reviews, that issue was addressed during the hearing, and petitioner had an adequate opportunity to litigate it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1981

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